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Supreme Court, U.S.
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No. 94-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WOODPOINTE INN ASSOCIATES LIMITED PARTNERSHIP; THOMAS A. HANDLOS; and LUCILLE HANDLOS, *Petitioners,*

v.

CITY OF HARPER WOODS, a Michigan municipal corporation; JAMES R. HALEY, Mayor; JAMES E. LEIDLEIN, City Manager; GERARD OWCZARZAK, City Building Inspector; RICHARD A. EISENGRUBER, THOMAS A. KASUNIC, JAMES N. MCNALLY, VICTOR G. MAROCCO, VIRGINIA ANN MICHELETTI, DAVID POCHMARA, ORESTO J. VELARDO, Members of City Council, for City of Harper Woods, Jointly and Severally, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JULIE MCCANN-O'CONNOR
(Counsel of Record)

JAMES E. TAMM
CHRISTOPHER T. KOCH
O'CONNOR, DEGRAZIA & TAMM, P.C.
4111 Andover Road – Suite 300 E
Bloomfield Hills, MI 48302
(810) 433-2000
Attorneys for Respondents

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

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QUESTIONS PRESENTED

I. Whether the "arbitrary and capricious" standard is correctly and consistently applied by the Circuits in local land use disputes alleging violation of substantive due process rights.

II. Whether the Sixth Circuit was correct in affirming the dismissal of a local land use dispute alleging violations of substantive due process where the City listed rational reasons for its denial of the property owners' request for a special land use, and where the City had discretion to grant or deny the request.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners,

Woodpointe Inn Associates Limited Partnership
Thomas Handlos and Lucille Handlos

and Respondents

City of Harper Woods, a Michigan Municipal Corporation
James R. Haley, Mayor
James E. Leidlein, City Manager
Gerard Owczarzak, City Building Inspector

Richard A. Eisengruber
Thomas A. Kasunic
James N. McNally
Victor G. Marocco
Virginia Ann Micheletti
David Pochmara
Oresto J. Velardo
Members of City Council, for City of Harper Woods, Jointly and Severally.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, City of Harper Woods, et al. ("City" or "Defendant") respectfully request that this Court deny Woodpointe Inn Associates Limited Partnership, Thomas and Lucille Handlos' ("Petitioners") Petition for Writ of Certiorari ("Petition") seeking review of the United States Court of Appeals for the Sixth Circuit's ("Sixth Circuit") opinion in this case.

OPINION BELOW

The opinion of the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan, Southern Division, is reported at 48 F.3d. 1220, 1995 W.L. 94760 (6th Cir. 1995).

JURISDICTION

The Sixth Circuit decision was entered on March 7, 1995. The Petition for Certiorari was docketed with the United States Supreme Court on June 5, 1995. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Sec. I, provides:

"Section I . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Title 42, U.S.C. Section 1983, provides that:

"Every person who under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Introduction

Petitioners, Woodpointe Inn Associates Limited Partnership, Thomas A. Handlos and Lucille Handlos, purchased a vacant piece of property ("Property") in Respondent, City of Harper Woods ("Defendant" or "City") in 1981. Over the next decade, Thomas A. Handlos ("Mr. Handlos") proposed various development schemes, none of which came to fruition. Finally, in 1991, the City granted his request for a special use permit to construct a hotel on the Property. Among the conditions attached to the

permit was that the project be commenced within one (1) year and that a bond equivalent to five (5%) percent of the improvement costs be posted prior to the time work on the project commenced. Although the City granted the special use, no work on the project had begun by November 1991, six (6) months after the permit was granted. Mr. Handlos requested an extension in January 1992, and again in May 1992, days before the one (1) year period was to expire. The City denied both requests and the permit expired.

Mr. Handlos re-applied for a special use permit in October 1992. The City denied it, citing his inability to complete the project over the past eight (8) years and his delinquent record in paying property taxes. Even before the City's denial, Mr. Handlos had filed suit in United States District Court for the Eastern District of Michigan, alleging that the denial of the special use permit was a violation of his right to substantive due process, as well as alleging other constitutional violations. Ultimately, the United States District Court granted the City's motion for summary judgment and the Sixth Circuit affirmed this decision.

B. Factual History

Petitioners' Property is zoned for commercial development. Under the City of Harper Woods Zoning Ordinance, Section 10-164, hotels are permitted in a general business district only after special approval.

Section 10-187 (B), *Procedures For Granting Special Approval Of Designated Land Uses,* specifies that "[t]he City Council as herein created, shall have the following specific powers and duties concerning special approvals. Section 2, *Authorization,* specifies:

> The special approval of specific land uses and activities, as required under section 10-164, may be authorized by the City Council provided that no application for special approval shall be acted upon by the City Council until after (1) a written recommendation is prepared and filed with the City Council by the City Planning Commission, which report

shall become part of the record, and (2) a public hearing is held by the Council.

Section 6, *Standards,* specifies that no special approval shall be granted by Council unless the special use meets certain standards. The Council is to consider whether the special use:

(a) Will promote the use of land in a socially and economically desirable manner for those persons who will use the proposed land use or activity; for those landowners and residents who are adjacent; and for the City as a whole.

(b) Is necessary for the public convenience at the location.

(c) Is compatible with adjacent uses of land.

(d) Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

(e) Can be adequately served by public services and facilities to existing land uses in the area.

(f) Will not cause injury to the value of other property in the neighborhood in which it is to be located.

(g) Will protect the natural environment and help conserve natural resources and energy.

(h) Is within the provisions of uses requiring special approval as set forth in the various zoning districts herein, is in harmony with the purposes and conforms to the applicable regulations of the zoning district in which it is to be located, and meets applicable site design standards for each use specified in Section 10-164.

(i) Is related to the valid exercise of the City's police power and purposes which are affected by the proposed use or activity.

Section 7, *Approval,* notes that:

City Council may deny, approve, or approve with conditions, requests for special approval of a land use. The decision on a special approval shall be incorporated in a statement of

> conclusions relative to the specified land use under consideration. The decision shall specify the basis for the decision, and any conditions imposed. Any approval given by the City Council under which premises are not used or work is not started within six months or when such use or work has been abandoned for a period of six months shall lapse and cease to be in affect [sic].

Between 1981 when Mr. Handlos purchased the Property, and 1991 when the City granted the request for special use, Mr. Handlos approached the City on numerous occasions with proposals for various developments for the Property. A chronological review of these proposals illustrates that the difficulty encountered by Mr. Handlos in developing the Property stemmed not from delays due to obstructions imposed by the City, but rather through self-inflicted delays. Mr. Handlos proposed various development projects for the Property from 1981 through 1991:

1981

In 1981, Petitioners submitted plans for a one hundred and twenty (120) room, four (4) story Sheraton Hotel *(Sixth Circuit Joint Appendix, p 367; hereafter "JA")*. The City initially welcomed the development, anticipating that the hotel project would bring new jobs to the City and provide needed tax revenue. As time passed, however, problems with the design of the hotel and its impact on City services became more apparent. Although Woodpointe Inn Associates Limited Partnership was formed for the purpose of developing the hotel project, it appeared that neither Woodpointe nor Mr. Handlos had the financial capability or experience to see the project through to completion.

1985

Even though Petitioners first submitted plans for the hotel in 1981, Petitioners' request for a special land use permit to develop the hotel was first presented to the City Council on January 16, 1985. The site plan did not comply with the requirements of the City Zoning Ordinance, and the permit was denied. (JA 369). Council considered a second request for a special use permit on

December 16, 1985, and again voted to deny the request, since the site plan was still not in compliance with the requirements of the Zoning Ordinance.

1986

In 1986, the City Planning Commission approved plans for a two (2) story Woodpointe Office Building. Even though both the City Planner and the Planning Commission approved the development of the office building, Petitioners failed to pursue the project and it was never built.

1988

In 1988, Mr. Handlos submitted a plan for a thirty eight (38) unit senior citizen housing development. As with the office building proposed in 1986, the proposal for senior housing was never pursued by Petitioners beyond the submission of the initial plan.

1989

No further effort was made by Mr. Handlos to construct a hotel or any other project on the Property until November 1989, when Petitioners filed a lawsuit against the City in the state court alleging violation of constitutional rights in connection with the City's refusal to grant a special use permit. The lawsuit sought declaratory relief, mandamus and damages. It was dismissed by the Wayne County Circuit Court in April 1990. (JA 344).

1990-1991

In July 1990, Mr. Handlos again sought a special land use permit to construct a hotel on the Property. The City Council voted to approve the special land use permit on May 6, 1991, subject to the following conditions:

1. All those conditions as specified by the Planning Commission in their October 24, 1990 approval, with the exception that the developer has one (1) year from this date to commence construction of this project;

2. The developer shall obtain and meet the requirements for all building, electrical, plumbing, mechanical and other such permits as may be necessary;

3. The developer shall submit a plan for the discharge for sanitary sewer that meets with the approval of the City engineer and does not diminish or adversely affect the sanitary sewer system service, and said plan shall call for the developer to incur any related costs;

4. The developer shall be required in accordance with Ordinance, Section 187 (A), to furnish the city with a cash deposit, certified check, irrevocable bank letter of credit or a surety bond from a surety company that is listed on the federal register, which is issued by the Department of Treasury, in an amount equivalent to five (5%) percent of the improvement costs to assure compliance with all ordinance and permit requirements; and

5. The developer shall be required to relocate, at his expense, any existing public utilities located on the property to the road right-of-way. (JA 371).

Although Petitioners' Brief implies that Mr. Handlos pursued a hotel development project over the course of approximately ten (10) years, the facts show otherwise.

In 1985, when Mr. Handlos requested a special use permit for the hotel project, there was public opposition to the development of the Property as a hotel. James McNally, a defendant in the District Court suit, voiced strong opposition to the hotel project. As noted by Petitioners (Petition at p. 3), Mr. McNally, a citizen whose home was located in close proximity to the proposed project, was present at public meetings and circulated information relating to the proposed development. Throughout this period, however, Mr. McNally was a private citizen, and had no connection to the municipal government.[1] The objections voiced by Mr. McNally and by other citizens of the City included

[1] Mr. McNally was elected to the City Council in May 1991, after Plaintiff's special use permit was issued.

concerns regarding traffic congestion, the size of the project, increased noise and activity due to its location in close proximity to a residential neighborhood, concerns over parking and the necessity for increased city services provided to the hotel. (Petitioner's Appendix at A-15 – A-20).

Although Petitioners assert that the sudden deafness and vertigo suffered by Mr. Handlos following the City's approval of the special use permit in May 1991 was responsible for the fact that the project was not commenced, a review of the facts shows otherwise. On August 7, 1991, Mr. Handlos sent a letter to the City indicating that the size of the project would be cut in half. (JA 28). Although the City Ordinance allowed six (6) months for construction to commence after approval by City Council, and Mr. Handlos was granted twice that amount of time, construction still did not begin. On January 10, 1992, he requested a one (1) year extension to begin construction. The request was denied by City Council on January 20, 1992. (JA 373). Among the reasons noted for the denial of his request for additional time was that Mr. Handlos had been given a reasonable amount of time to substantially commence the project.[2] Furthermore, he had informed the City Council on May 6, 1991, that financing for the project was in line, and when questioned regarding who the financial backers of the project were, he declined the opportunity to answer that question. Moreover, Mr. Handlos had represented to the City Manager that the project was at a stage where the architect and construction manager could take over the project, without the need for his involvement.

Second Request For Extension

On May 4, 1992, shortly before Petitioners' special use permit was due to expire, another request for extension of time was made to the City Council. City Manager, James Leidlein,

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[2] Brandon Rogers, the City Planning Consultant, stated that the one (1) year period allowed by the City for Plaintiff to commence construction was very reasonable. Mr. Rogers also noted that most bona fide projects should be able to be started within a year or that it would be otherwise premature to file them. (JA 479-480).

addressed the City Council and detailed the numerous problems which the City had encountered since the hotel project was first proposed. Mr. Leidlein noted that Mr. Handlos had cited sewer problems as one of the major reasons that he was unable to begin construction of the hotel within a one (1) year period. Mr. Handlos had been advised by the City of sewer capacity problems in the area more than a year before, however, when the City indicated to him that sewer problems might affect the feasibility of his project. (In 1985, when the project was first proposed, the City had a potential solution to sewer capacity problems, but because of changes in the sewer system and in environmental laws, the former solution was no longer viable.) As a condition to the special use approval, the City required Mr. Handlos to submit a plan for the discharge of sanitary sewer meeting the approval of the City Engineer, which did not diminish or adversely affect the sanitary sewer system. Mr. Leidlein indicated further that other than a few phone calls, Mr. Handlos had not submitted any plans to the City or the building department showing how he was going to address the sewer question. He noted that Mr. Handlos had "continually assured the City that once he received City approval, he was ready to go." Although the project was approved almost a year before, ". . . to this date the project essentially has gone nowhere." Mr. Leidlein noted that property taxes on the Property were still in arrears, with the last payment made in March of 1991, for the 1988 and 1989 taxes. The 1990-1991 taxes had yet to be paid, and the delinquency was in excess of $8,500.00. Based on Petitioners' failure to comply with the reasonable conditions of the special use approval, Mr. Leidlein recommended that the second request for an extension of time in which to commence the project be denied. (JA 375).

City Council voted to deny the request for an extension of time to commence construction, citing many of the same reasons noted in the January 1992 denial. Furthermore, the Council noted that Mr. Handlos had failed to submit the bond which was a specific requirement of the City's approval of the construction project.

In an apparent effort to commence construction by the May 6, 1992 deadline, Mr. Handlos began doing ground work on the Property himself. City employees observed Mr. Handlos, the general partner and sole known financier of the multi-million dollar project, taking a sledge hammer to the curb in order to construct a curb cut. The May 4, 1992 City Council Minutes noted, "... Mr. Handlos has been seen personally wielding a sledge hammer to do the curb cuts without using proper signage or proper safety precautions taken to protect the citizens, which shows that the proper backing is not there for such a large construction project when the general partner of the partnership is out there doing the 'grunt work'." (JA 375).

Re-Application For Special Use

Following expiration of the special use permit, Mr. Leidlein informed Mr. Handlos that it would be necessary for him to reapply before construction could begin. (JA 381). Petitioners reapplied in June 1992 and City Council scheduled a hearing to consider the request in October 1992. Prior to the time the City Council met to consider the request, a lawsuit was filed by Petitioners in the United States District Court for the Eastern District of Michigan, Southern Division. Although the City Planning Commission and the City Manager approved the site plan, ultimately the City Council voted to deny the special use permit, expressing doubts regarding the ability of Mr. Handlos to complete the project. Pursuant to City of Harper Woods Zoning Ordinance, Section 10-187 (B) (6) and (7), the City Council was required to consider whether the special use complied with the standards set forth in the Ordinance, and following such consideration was vested with the authority to deny, approve, or approve with conditions, any request for special approval of a land use. *(City of Harper Woods Zoning Ordinance No. 265, § 10-187 B (6) and (7))*. Only after the City Council had complied with the requirements of Section 10-187 B and granted special approval, was the Council required to permit the special use pursuant to Section 10-164 of the Zoning Ordinance.

Numerous citizens spoke in opposition to the project at the public meeting held on October 5, 1992, expressing concern regarding traffic and lack of parking, as well as the fact that the developer had never started work on the project, in spite of previous approvals. City Council voted to deny the special use, noting that the project had been before the City for in excess of eight (8) years, and had consumed a considerable amount of time and effort on the part of the City administration. Moreover, City Council noted that the developer had failed to pay property taxes in a timely fashion, and was currently delinquent on the 1991 and 1992 taxes. Finally, the fact that Mr. Handlos had made representations assuring the City of his ability to find a solution to the sanitary sewer issue, and the fact that he had, in an attempt to commence construction prior to the expiration of the special use permit issued May 1991, begun breaking out the concrete curbs with a sledge hammer and issued a press release stating that he would complete only the first two floors of the project due to an "uncertain economy" all led the Council to express doubts regarding Petitioners' ability to complete the project. (JA 182). Petitioners' suit, filed prior to the time the City Council voted to deny the re-application for a special use claimed that the City and various employees and members of the City Council violated Petitioners' rights to substantive due process.

Although Petitioners complained that the City "maliciously" and "drastically" increased the property assessment on the Property from $33,210.00 to $157,500.00 in order to "harass" Mr. Handlos, the increase in assessment took place in March 1987, four (4) years before Petitioners' special use permit was issued.[3] Mr. Handlos' statement that the City enacted a fast food restaurant restriction ordinance for the sole purpose of "blocking" his ability to construct a fast food restaurant on the proposed hotel site is equally without merit. In his deposition testimony, Mr. Handlos stated that he had never attempted to construct a fast food restaurant on the Property and had never applied for

[3] The City assessor, Gerald Owczarzak, noted that there have been dramatic increases on numerous parcels of commercial property since he was assessor. (JA 485).

approval to construct a fast food restaurant on the Property. (JA 389).

On February 24, 1993, the United States District Court, Eastern District of Michigan, dismissed all counts of Petitioners' Complaint upon Defendant's motion to dismiss, other than Count II (Equal Protection) and Count III (Substantive Due Process).

On August 25, 1993, the District Court granted summary judgment on the remaining counts, granting Defendant's motion and dismissing the claims in their entirety.

Petitioners next appealed the Court's order to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's order in an opinion dated March 7, 1995.

WHY THIS WRIT SHOULD BE DENIED

Petitioners apparently base their argument for granting a Writ of Certiorari on Supreme Court Rule 10.1(a) and (c) contending that the Sixth Circuit decision conflicts with other circuit court rulings. In fact, the Sixth Circuit decision is consistent with this Court's prior rulings and the other circuit rulings are either in accord, or are clearly, factually distinguishable.

I.

THE "ARBITRARY AND CAPRICIOUS" STANDARD IS CORRECTLY AND CONSISTENTLY APPLIED BY THE CIRCUITS IN LOCAL LAND USE DISPUTES ALLEGING VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS.

A. *The Circuit Courts Have Consistently Recognized That The Denial Of A Land Use Permit May, Under Appropriate Circumstances, Constitute A Substantive Due Process Violation*

The general principles underpinning federal substantive due process in the context of land use related civil rights litigation are well-settled. The United States Supreme Court has explicitly

recognized that citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions, *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 263, 97 S. Ct. 555, 562 50 L. Ed. 2d. 450 (1977), and all of the various circuits recognize that, under appropriate circumstances, the denial or withholding of a building permit or site plan approval may constitute a substantive due process violation. *Pearson v. City of Grand Blanc,* 961 F. 2d. 1211, 1217 (6th Cir. 1992); see also *Littlefield v. City of Afton,* 785 F. 2d. 596, 605-607 (8th Cir. 1986).

As more fully set forth below, the standard applied by all of the circuit courts in reviewing substantive due process claims in the land use/zoning context is whether the governmental action was arbitrary and capricious and/or rationally related to a legitimate governmental interest. However, uniformity among the circuits in the application of the arbitrary and capricious standard does not and cannot, as Petitioners suggest, guarantee uniformity of results. Zoning and land use disputes are peculiarly fact dependent. The various circuits have been asked to apply the arbitrary and capricious standard in many contexts involving land use cases. It is therefore incongruous to suggest, as Petitioners do, that differing results necessarily mean that the circuits disagree as to the appropriate principles to be applied.

As stated in *Scott v. Greenville County*, 716 F. 2d. 1409, 1420 (4th Cir. 1983):

> While defendants are undoubtedly correct in asserting that challenges to local zoning decisions are rarely successful outside the context of racial discrimination . . . the primary distinction between winning and losing the case is the sufficiency of evidence and not that the claim is not facially viable . . . regardless of the deference normally afforded zoning practices by the courts, the constitution does not tolerate arbitrary and unreasonable action. Citing *Altair Builders Inc. v. Village of Horseheads,* 551 F. Supp. 1066, 1069 (W.D. N.Y. 1982)

While factual differences affect the disposition of each case, the essential guiding principles employed by the circuits are consistent. All circuits recognize that land use plaintiffs who bring substantive due process claims face difficult evidentiary hurdles. Moreover, all circuits recognize the prudential concern that federal courts should not sit as a super-legislature in land use cases involving peculiarly local interests. A thorough review of the case law illustrates that the circuits have noted discrete subcategories of governmental activities which typically evidence arbitrary and capricious action - for instance, decisions based on personal animus, discrimination or improper political objectives, and denial of a permit or an application when it is otherwise ordinarily granted as of right. These factual subcategories do not create separate standards of review for alleged substantive due process violations; the essential test remains whether the underlying action was arbitrary or capricious.

B. *The Circuit Courts Uniformly Apply An Arbitrary Or Capricious Standard In Reviewing Land Use Decisions For Substantive Due Process Violations*

Contrary to Petitioners' contention, there is substantial uniformity among the circuits with respect to the appropriate review of substantive due process claims in the land use context. The following circuit by circuit survey illustrates that an arbitrary or capricious standard of review is consistently applied. A somewhat more detailed analysis of the factual basis underpinning the cited cases is included because, as the *Scott* court emphasized, the decisions are fact-dependent.

Petitioners attempt to cloud the underlying uniformity among the circuits by plucking out of context quotes from cases which differ factually. In cursory fashion, Petitioners catalogue purportedly "analogous" cases where the courts reached dissimilar results and imply a lack of uniformity of the law. Petitioners also argue that, in light of different results obtained in different circuits, the trial and circuit court erred in this case in concluding that no genuine issue of material fact existed. On these bases, Petitioners request the Supreme Court's assistance in reconciling the "disparity" among circuits.

Petitioners' attempt fails on two grounds. First, upon closer examination, it is evident that in each of the cited cases the circuit courts uniformly applied the "arbitrary and capricious" standard of review in analyzing the respective plaintiffs' federal substantive due process claims. Second, as the cases cited by Petitioners make clear, the respective decisions were premised, as all substantive due process claims are, on specific factual findings.

The First Circuit applies the following test in considering substantive due process challenges to a land use ordinance: "a court should not set aside the determination of public officers in [zoning] matter[s] unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense' " *Smithfield Concerned Citizens for Fair Zoning v. The Town of Smithfield,* 907 F. 2d. 239, 243 (1st Cir. 1990). In *Smithfield,* plaintiffs complained that the new zoning ordinance, which increased lot size requirements and rezoned commercial areas to residential, was arbitrary inasmuch as it was "not grounded in the necessary planning and analysis, by and with the participation of experts in the field." The *Smithfield* court declined to micro-analyze the scope and extent of the council's information gathering process and dismissed plaintiff's claims. *Id.* at 245. In *Licari v. Ferruzzi,* 22 F. 3d. 344 (1st Cir. 1994), the First Circuit, while admitting that the refusal to issue building permits generally does not implicate substantive due process, nonetheless emphasized that such claims were not foreclosed and stated that "[w]e have never announced a rule . . . [precluding] . . . substantive due process violations by land use planning officials." *Id.* at 349.

In *Walz v. Town of Smithtown,* 46 F. 3d. 162 (2nd Cir. 1995), the Second Circuit also applied an arbitrary and capricious standard to a claim for violation of substantive due process under the following distinguishing facts. In *Walz,* plaintiff's water well failed, which forced him to apply for emergency connection to public water service. The emergency application was approved by appropriate authorities, but the highway department refused to

grant plaintiff an excavation permit unless the plaintiff granted the highway department a fifteen (15) foot easement. Typically, such permits were granted as of right. The *Walz* Court found that, denial of the permit was not only arbitrary and capricious but, the court implied, extortionary.

The Third Circuit also applies the arbitrary and capricious standard. *Bello v. Walker,* 840 F. 2d. 1124 (3rd Cir. 1988), *cert denied,* 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d. 107 (1988). See also, *DeBlasio v. The Zoning Board of Adjustment for the Township of West Amwell,* 53 F. 3d. 592 (3rd Cir. 1995) The Third Circuit, when faced with claims that a municipality's zoning regulation violated plaintiff's right to substantive due process, requires plaintiff to prove that the regulation was arbitrary or irrational. *Bello* at 1129 citing *Pace Resources, Inc. v. Shrewsberry Township,* 808 F. 2d. 1023 (3rd Cir. 1987) *cert denied* 482 U.S. 906, 107 S. Ct. 2482, 96 L. Ed. 2d. 375 (1987). In *Bello,* plaintiff sought to develop, in five phases, multiple family housing in conformity with applicable zoning restrictions. Plaintiff built phase I then applied for a building permit for phase V. Defendants denied the permit ostensibly because phase II through IV were not completed. Significantly, the *Bello* Court could find no legitimate reason why the permit was not issued. In short, the actions of the municipality had no rational relationship to any legitimate governmental interest. *Id.* at 1130.

Petitioners alleged that Mr. McNally, while not a member of the City Council and while acting solely as a private citizen, organized public opposition to Petitioners' proposed project. Moreover, Mr. McNally's opposition to the project was not "illegal" or "improper" as was the conduct contemplated in *DeBlasio.* The official's conduct in *DeBlasio* was improper because, despite his financial interest in the outcome, he did not excuse himself from participating in the proceedings. Here, Mr. McNally was not a member of the City Council when Petitioner's building permit was approved and has never had any financial interest in the success or failure of Petitioners' project.

In *Scott v. Greenville County, supra,* the Fourth Circuit held the applicable standard in such land use cases to be "whether

there is a basis for concluding an abuse of discretion [or] caprice in [a] zoning administrator's refusal to issue a building permit." In *Scott,* plaintiff presented evidence suggesting that the city council acted completely outside its authority, and for racially discriminatory reasons, in issuing a moratorium on building permits, of which plaintiff's was the only application pending. Public opposition to the project arose in part because of fears that low income housing would bring minorities and crime. The council delayed approval of the permit in order to attempt to rezone the property and thus create a basis for denying the permit where none previously existed.

The *Scott* court noted that the federal courts are generally "reluctant to sit as a zoning board of appeals" when presented with claims which, though couched in constitutional language, in reality amount only to a run of the mill dispute between a developer and a town planning agency. The court stated that when a zoning action is "tainted with fundamental procedural irregularity, racial animus or the like, such action can amount to an actionable denial of due process." *Id.* at 1419.

The Fifth Circuit likewise recognizes that the denial of a variance may constitute a property right, the arbitrary deprivation of which implicates substantive due process rights. *Shelton v. City of College Station,* 754 F. 2d. 1251 (5th Cir. 1985), *cert denied,* 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d. 566 (1986). In *Shelton,* the Fifth Circuit reversed the district court's entry of summary judgment against plaintiff, questioning whether the denial of a routine variance was arbitrary and capricious, with no substantial relation to the general welfare. *Id.* at 1255. A question of fact existed based on defendants' admission that almost every business in the area, including the subsequent occupier of plaintiff's premises (and three adjacent businesses), had been granted the same routine parking variance sought by plaintiff.

Contrary to Petitioners' assertions, the Sixth Circuit has not merely borrowed the "shock the conscience" standard applicable to criminal cases in determining whether a substantive due process violation has occurred in land use disputes. Rather, as a full reading of the *Pearson* decision makes clear, the Sixth

Circuit, like every other circuit, reviews zoning decisions for violations of substantive due process under an "arbitrary and capricious" standard.

In order to avoid confusion over the applicable standard of review, however, the *Pearson* court attempted to define the degree of "arbitrariness" and/or "capriciousness" necessary under federal law to sustain a claim for violation of substantive due process. The *Pearson* court emphasized that the "shock the conscience" reference used in other substantive due process contexts was useful to emphasize the degree of arbitrariness required to set aside a zoning decision by a local zoning authority — and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law. *Id.* at 1222. The *Pearson* court further noted that "shocks the conscience" refers to extreme irrationality.

Far from creating a separate and distinct substantive due process standard for land use cases, the *Pearson* Court merely applied the prevailing arbitrary and capricious standard. As in most federal land use cases, the *Pearson* Court concluded that based on the record, plaintiff failed to establish a substantive due process violation.

The Seventh Circuit also recognized that the enforcement of a zoning decision will only be overturned if it is arbitrary or applied with discriminatory intent. *Scudder v. Town of Greendale, Indiana,* 704 F. 2d. 999 (7th Cir. 1983). The Seventh Circuit defines arbitrary as being reached "without adequate determining principle" or "unreasonable". *Id.* at 1002. In *Scudder,* the Seventh Circuit affirmed the district court's dismissal under the following facts. Plaintiff applied for permits to build two residences on appropriately zoned property. While applications were pending, a neighbor (a private citizen who held no position in the Greendale Town Government) wrote a letter to the Board of Trustees urging denial of the permit. The Board eventually denied the permit on the basis that the property did not abut a dedicated street as required by the ordinance. Plaintiff sued for due process

violations alleging a "conspiracy" to deny plaintiff the use of his land.

The *Scudder* court dismissed the action because plaintiff proffered no evidence to support his claim that the ordinance was applied discriminatorily. *Id.* at 1003. The *Scudder* court also discounted plaintiff's heavy reliance on the neighbor's opposition. "Certainly the federal constitution does not prohibit a citizen in a democratic society from voicing an opinion to a duly elected official regarding the denial or issuance of a permit." *Id.*

The Eighth Circuit similarly recognizes that an arbitrary denial of a building permit may state a claim for a substantive due process violation. *Littlefield v. City of Afton,* 785 F. 2d. 596 (8th Cir. 1986). In *Littlefield,* plaintiff alleged that the defendants violated its substantive due process rights by conditioning the issuance of a building permit on plaintiff's agreement to convey land to a private individual for non-public use. *Id.* at 603-4. The Eighth Circuit, applying the arbitrary and capricious standard, held that plaintiff presented sufficient evidence to submit the claim to the jury.

The Ninth Circuit is consistent with *Pearson.* In *Bateson v. Geisse,* 857 F. 2d. 1300 (9th Cir. 1988), plaintiff intended to develop a condominium project on property within an appropriately zoned area. Bateson satisfied the final requirements imposed on the building permit, and requested issuance of the permit. The request was denied after the City imposed additional requirements on the permit and initiated a zoning change on plaintiff's property which would have prevented him from building the proposed project. The *Bateson* court noted that plaintiff was required to prove that the interference with his property rights was "irrational or arbitrary", *Id.* at 1303 citing *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S. Ct. 2882, 2892, 49 L. Ed. 2d. 752 (1976), and concluded that defendants acted arbitrarily. The city's regulations provided that once an applicant's building plans complied with the code and other applicable laws and the fees were paid, the building official "must" issue a building permit to the applicant. The regulations did not provide for review by the city council before a permit could issue.

Nonetheless, the city council voted to withhold issuance of the permit without any process whatsoever.

The circuits are in substantial agreement regarding application of the arbitrary and capricious standard of review in substantive due process land use claims, and have not "made inconsistent interpretations" of what constitutes due process violations in land use litigation.

There is uniform acknowledgement that succeeding on such grounds is difficult however, and that run of the mill zoning or building disputes, like this case, do not rise to the level of a constitutional violation.

II

THE SIXTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED IN THIS CASE TO SUPPORT ANY VIOLATION OF SUBSTANTIVE DUE PROCESS.

A. *In Land Use Litigation, Reference To Government Action Which "Shocks The Conscience" Is Useful To Indicate The Degree Of Irrationality Necessary To State A Substantive Due Process Claim.*

In land use litigation alleging substantive due process violations, reference to government action which would "shock the conscience" is useful and illustrative of the degree of irrationality and arbitrariness necessary to state a substantive due process claim. Expressed another way, the state action must show "outrageous government conduct." These references to the degree of "arbitrary and capricious" behavior necessary to state a claim are an acknowledgement that the court must exercise care not to expand the concept of substantive due process "because guideposts for responsible decisions in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d. 261, 273 (1992) quoting

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225-26, 106 S. Ct. 507, 88 L. Ed. 2d. 523 (1985).

This admonition is particularly appropriate in land use litigation matters, an area of historically local control, and may reflect fear of uncontrolled judicial intervention in such zoning matters. Roberts and Shearer, *Land Use Litigation: Takings and Due Process Claims*, the Urban Lawyer, Volume 24, No. 4 (Fall 1992) at 839. (Indeed, Professors Roberts and Shearer refer to *Elsmere Park Club Ltd. Partnership v. Town of Elsmere*, 771 F. Supp. 646 (D. Del. 1991), a case cited by Petitioners in support of their claims, as an example of unwarranted judicial intervention in zoning matters). The requirement that government not be "arbitrary or capricious" in its actions is a constitutionally imposed limit to prevent government from abusing its power. *Collins*, 112 S. Ct. at 1069, 117 L. Ed. 2d. at 274.

In *Pearson v. City of Grand Blanc, supra* the Sixth Circuit discussed the usefulness of measuring the arbitrariness of state action with reference to "shocks the conscience" terminology.[4] The *Pearson* court stated that the state action must be "arbitrary and capricious action in the strict sense", with no rational basis for the decision. *Pearson* at 1221. *Pearson* went on to state that the "shocks the conscience" terminology was useful in the zoning context to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law, where state administrative action may be set aside as "arbitrary and capricious" on the grounds that it is not supported by substantial evidence. *Pearson* at 1222. "Shocks the Conscience" terminology refers to extreme irrationality, which is consistent with the standard applied by other circuits.

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[4] Donald A. Dripps, *At the Borders of the Fourth Amendment: Why A Real Due Process Test Should Replace the Outrageous Government Conduct Test*, University of Illinois Law Review Vol. 1993, No. 2, cited by Petitioners is inapposite to the facts of this case, since it deals exclusively with the constitutional law of search and seizure under the Fourth Amendment.

The continuing relevance of this terminology was recently noted. Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, Columbia Law Review, Volume 93, II (March 1992). [hereafter, Fallon, *Due Process*]. Professor Fallon, in analyzing this Court's recent decision in *Collins v. City of Harker Heights*, *supra* noted that the decision could be interpreted to suggest that conduct could be arbitrary in a constitutional sense only if it shocked the conscience. *Id.*, at 325.

The underlying principle by which all of the circuits determine whether a substantive due process violation has been stated is whether the government's action has been shown to be "arbitrary and capricious". (See Argument I, supra). As Professor Fallon notes, the underlying idea is that government officials must act on "public spirited" rather than "self-interested or invidious motivations", and that there must be a rational or reasonable relationship between government's ends and its means. *Fallon, Due Process, supra* at 310.

Accepting that the substantive rights protected by the Due Process clause of the Constitution are not susceptible to a simple and easily stated formula, the generally accepted view that government action must not be arbitrary and capricious, that it must be based on the public interest rather than personal motivation, and that it should accord with widely shared moral intuitions or principles, makes the terminology employed by the *Pearson* court appropriate to a consideration of whether a substantive due process claim has been stated.

Considered in this context, Professor Fallon's article supports the approach taken by the Sixth Circuit in analyzing substantive due process claims. He states that in cases of this kind, the courts generally will render a judgment of unconstitutionality only when government, in its view, has behaved in a way that can be shown to be wrongful by relatively direct argumentative appeal to some moral intuition or relatively determinate principle that it believes to be widely shared and, preferably, rooted in history. *Fallon, Due Process, supra* at 321.

Testing this formulation against the *Pearson* "shocks the conscience" approach provides appellate courts with a rough yard stick of what society would judge to be a grievous breach of the government's duty to pursue legitimate ends in reasonable ways.

There is general agreement among the circuits that "arbitrary and capricious" conduct by the government is the standard by which substantive due process claims should be assessed. It is in determining what actions constitute "arbitrary and capricious" conduct that difficulties arise. Given the complexity and the reach of the Due Process clause it is unlikely that this question can be easily resolved. Weighing against the expansion of this area of the law, however, are concerns regarding the increasing volume of federal litigation, the necessity of developing constitutional standards defining the scope of duties and liabilities of state officials and, finally, a reluctance to displace traditional state authority and alter "longstanding balances of power in the federal system." *Id.*, at 350.

Given the need to strike a proper balance between the traditionally local nature of land use regulation and the constitutionally mandated protection from arbitrary government behavior, the courts have wisely concluded that government action is implicated under the Due Process clause only when it engages in "arbitrary" conduct which is repugnant to widely held beliefs, but which is not, in any sense, the equivalent of the state law standard prohibiting land use regulation without substantial evidence regarding its necessity. The *Pearson* approach is an appropriate expression of this balancing of interests.

B. *Standard Of Review*

The Sixth Circuit reviewed the District Court's grant of summary judgment de novo. *Hanover Ins. Co. v. American Engineering Co.*, 33 F. 3d. 727, 730 (6th Cir. 1994). Once a defendant makes a properly supported motion for summary judgment, the burden shifts to the plaintiff to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d. 202 (1986). Summary judgement is justified if, based on all of the

evidence presented, including pleadings, depositions and answers to interrogatories, the court is satisfied there is no genuine factual issue for trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Although the court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, only reasonable inferences from the evidence need be considered by the court. Whether an inference is reasonable must be considered "in light of the competing inferences" to the contrary. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d. 538 (1986). A court is not bound to accept as true a legal conclusion couched as a factual allegation. Furthermore, the court is not bound to credit, and indeed may disregard assertions where no actual facts in support of the assertions were alleged. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 92 L. Ed.2d. 209, (1986).

In the end, the non-moving party must do more than present a "scintilla" of evidence in its favor. *Anderson*, 477 U.S. at 252. If the evidence is merely "colorable" or "not significantly probative" a motion for summary judgment may be granted. *Anderson*, 477 U.S. at 249-250.

C. *Summary Judgment Is Appropriate Where There Are No Genuine Issues Of Material Fact Regarding A Substantive Due Process Violation*

To state a claim that the City's action violated substantive due process, Petitioners must demonstrate that they had a property interest which could support the substantive due process claim for a special use permit, that they possessed a legitimate claim of entitlement, and that the government action in denying the permit was arbitrary and irrational, with no reasonable basis. *Triomphe Investors v. City of Northwood*, 49 F. 3d. 198, (6th Cir. 1995). The claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning. *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F. 3d.

810, 828, (4th Cir. 1995), quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d. 797 (1974).

The procedures governing the grant or denial of a special use are set forth in the City of Harper Woods' Zoning Ordinance. Although Section 10-164 of the City Ordinance, *Uses Permitted After Special Approval*, states that hotels, among other uses, shall be permitted by the City Council, it continues that such uses shall be permitted only "after it [City Council] has conducted a public hearing and after review of the proposed site plan by the City Planning Commission pursuant to procedures and general standards established in Section 10-187B, subject to the specific standards for each particular land use hereinafter itemized and subject to site plan review required under Sections 10-165 and 10-134." The special use permit is required, therefore, only after the City Council approves the special use request, and furthermore considers it in light of the standards set forth in 10-187B(6). After determining whether the special use complies with these standards, Section 7, *Approval*, states that "the City Council may deny, approve or approve with conditions, requests for special approval of a land use." Contrary to Petitioners' assertions that there is no discretion on the part of the City Council in reviewing and approving a request for a special use, City Council is given broad discretionary authority.

The required focus in assessing a constitutional violation based on denial of substantive due process is not whether the denial of the request for special use was supported by a preponderance of substantial evidence, as might be the case in a state court inquiry, but rather whether City Council acted irrationally in denying the permit. *Triomphe*, 49 F. 3d. at 202. If a reasonable basis exists for denying the special use request, then a substantive due process violation claim is unfounded. *Id.* Moreover, the City Council may properly consider citizen opposition to the proposed property use. Even negative attitudes or unsubstantiated fears "are properly cognizable in a zoning proceeding." *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 448, 105 S. Ct. 3249, 87 L. Ed. 2d. 313 (1985). The City Council based its denial of Plaintiff's 1992 reapplication for a special use on

legitimate doubts regarding the ability of Mr. Handlos to complete the project, given the eight (8) years during which it had been before the City Council. The City Council also considered the tax arrearages, the failure of the plaintiff to propose any solution to the sanitary sewer issue, and the fact that Mr. Handlos was the only construction worker who had ever been seen working on the project during the time the 1991 special use permit was in effect.

Petitioners' assertion that partisan, political reasons unrelated to the merits of the application were responsible for the City's decision, thus establishing a potential substantive due process violation, are completely and utterly unsupported in the record.

The facts show that City Councilman McNally, about whom Petitioners complain, was a vocal opponent of Petitioners' *1985* special use request, which was denied by the City Council. Mr. McNally was, however, a private citizen at this time, unconnected in any way to the City government. As such, he had a right to voice his opposition to the hotel project as he saw fit. *Cleburne*, 473 U.S. 432, 448. Even if such citizen opposition had influenced the City's decision to deny the special use permit in 1985, it would not have given rise to a substantive due process violation. "Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community." *Sylvia Development Corp.*, 48 F. 3d. at 828. Moreover, the events of which Petitioners complain took place in 1985, six (6) years prior to the time City Council *approved* Petitioners' request. Events which took place six (6) years prior to the acts complained of, and are based on the behavior of private citizens simply do not state a claim for substantive due process violations on the part of the City. It was Mr. Handlos who failed to comply with the reasonable conditions imposed by City Council in granting the special use permit in May 1991. During the year in which he was given to commence construction of the hotel project (two times the length specified by the City Ordinance) he took no steps to

comply with the requirement that he submit a plan for the discharge for sanitary sewer that met with the approval of the City Engineer and did not adversely affect the sanitary sewer system. During the course of that year, no plans were submitted to the City Engineer regarding the sewer discharge. Mr. Handlos tendered no bond to the City during the course of the year, as required as a condition to the special use, attempting only to tender a five (5%) percent bond for the estimated cost of the foundation improvements, rather than a five (5%) percent bond for the cost of the project improvements days before the special use permit expired.

Although, as Petitioners assert, the re-application for a special use permit filed by Mr. Handlos in October 1992, was essentially the same proposal which had been presented to the City Council the prior year, the Council's decision to deny the special use permit was clearly rational given the circumstances of the case and the City's prior dealings with Mr. Handlos. In denying the request, City Council noted that taxes on the Property continued to be in arrears, that during the prior year, Mr. Handlos had submitted no plans to the City Engineering Department regarding the sewer discharge problem, that Mr. Handlos had failed to tender the five (5%) percent improvement bond required as a condition, and that Mr. Handlos was the only construction worker to have worked on the project. Taking into consideration these facts, it was a rational decision on the part of the Council to conclude that Mr. Handlos was unable to complete the project and that to allow him to continue could very well result in the City being left with partially completed "improvements" which would have to be finished at taxpayer expense. Although the summary judgment standard requires a court to resolve conflicting inferences from circumstantial evidence in favor of the non-moving party, it does not require the court to "... ignore or distort the plain meaning of words or conveniently to read them out of context." *Sylvia Development Corp.*, 48 F. 3d. at 822 quoting *Ford Motor Co. v. McDavid*, 259 F. 2d. 261, 266 (4th Cir. 1958) *cert denied* 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d. 229 (1958).

Petitioners' attempts to cast the comments made in 1985 by Mr. McNally and other citizens opposing the development of the hotel project on Petitioners' Property as improper, are a gross distortion of the facts, in an attempt to imply that political or racial animus was involved in the City's decision, even though the record is completely devoid of any such inferences.[5]

Petitioners contend that the "only possible legal basis" for denying the request for extension of the special use permit and the re-application was the existence of new ordinances, standards or regulations. (Petition at 23). This is not only factually inaccurate, but also misconstrues the protection afforded by the concept of substantive due process, which requires a showing that the City's action had no rational basis, and was egregious, outrageous, and irrational. *Amsden v. Moran*, 904 F. 2d. 748, 754 (1st Cir. 1990), *cert denied*, 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d. 702 (1991).

Petitioners cite *Walz v. Town of Smithtown, supra*, where evidence showed that the local ordinance allowed officials no discretion regarding whether to grant a permit. The Council had authority to review the request to determine if it met the standards set forth in the Ordinance, and then to approve, deny or approve the request with conditions. Moreover, Petitioners do not allege that the Council's denial of the extension was merely an extortionary attempt to gain concessions from Petitioners.

Petitioners cite *DeBlasio v. Zoning Board of Adjustment for the Twp. of West Amwell, supra* where evidence indicated personal financial gain by a council member motivated denial of the permit. The record in this case shows no evidence whatsoever of personal animosity or partisan political reasons as the basis for the

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[5] Note that allegations raising the issue of racial or political animus were first raised by Petitioners in responding to Defendant's Motion to Dismiss in the District Court. The issue was never mentioned in either the Complaint or First Amended Complaint filed by Petitioners with the U.S. District Court. Moreover, these allegations refer to the 1985 denial of Petitioners' special use request, not the 1991 grant of the request. In light of the substantial problems with the earlier attempt to develop the Property there was a reasonable basis for denying the re-application request in 1992. *Triomphe*, 49 F.3d. at 202.

City's denial of the re-application, in spite of the fact that Petitioners took approximately twenty (20) depositions during discovery.

Petitioners cite *Scott v. Greenville County, supra* where evidence supported plaintiff's contention that denial of the developer's request was based on racial animus. The record in this case is completely devoid of any evidence that the City's action in denying the re-application was motivated by racially discriminatory intent.

Petitioners cite *Bello v. Walker, supra* where evidence indicated defendants denied a permit for personal and political reasons. There is no evidence in the record in this case to show that the 1992 denial of Petitioners' special use was motivated by personal or political reasons.

There is no evidence in the record to support any inference that the City acted in denying Petitioners' re-application for a special use for anything other than the rational reasons set forth in the Council's decision. Petitioners ignore the fact that a special use permit was issued in May 1991, and that Mr. Handlos was unable to commence construction during the one (1) year period prior to the expiration of the permit, and failed to comply with other conditions attached to the permit. Given the development history of this project, and the inability of Mr. Handlos to proceed with development, the City was fully justified in denying the re-application request.

This case provided no "genuine" issues of material fact. Petitioners offered only "legal conclusions" couched as "factual assertions" and unsupported inferences, based on language taken out of context. The evidence offered by the City in support of its actions was persuasive and essentially uncontroverted. Summary judgment was appropriate under the standards set forth by this Court, and Petitioners' have not — and cannot — offer any valid reasons for review of the decision of the Sixth Circuit Court of Appeals.

CONCLUSION

Upon review of the facts and circumstances surrounding this case, this Court should deny the Petition of Woodpointe Inn and Thomas and Lucille Handlos, seeking review of the dismissal of their federal claims because it is clear that the decision was properly made and this case otherwise fails to warrant review by this Court.

Dated: June 26, 1995

Respectfully submitted,

O'CONNOR, DEGRAZIA & TAMM, P.C.
By: JULIE MCCANN-O'CONNOR
(Counsel of Record)
JAMES E. TAMM
CHRISTOPHER T. KOCH
4111 Andover Road - Suite 300 E
Bloomfield Hills, MI 48302
(810) 433-2000